

NOT DESIGNATED FOR PUBLICATION  
**ARKANSAS COURT OF APPEALS**

DIVISION II  
No. CA08-274

SHEP AKINS d/b/a SHEP AKINS  
CUSTOM HOMES, SHEP AKINS d/b/a  
SHEP AKINS CONSTRUCTION,  
APPELLANT

V.

NAUTILUS INSURANCE COMPANY,  
APPELLEE

**Opinion Delivered** October 8, 2008

APPEAL FROM THE WASHINGTON  
COUNTY CIRCUIT COURT,  
[NO. CV2006-1511]

HONORABLE MARK LINDSAY,  
JUDGE

AFFIRMED IN PART; REVERSED IN  
PART

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**SAM BIRD, Judge**

This case concerns the breach of a contract for builder's liability insurance. Appellee Nautilus Insurance Company filed a complaint against appellant Shep Akins, d/b/a Shep Akins Custom Homes, seeking to recover damages for Mr. Akins's failure to pay an additional amount allegedly owed as a final adjusted premium under the contract. In a judgment dated December 21, 2007, the trial court found that the parties entered into a contract of insurance; that Mr. Akins paid an initial premium of \$6,167 (excluding taxes); that Nautilus conducted an audit pursuant to the contract; and that Mr. Akins owed Nautilus an additional premium of \$25,290.72 (including fees and taxes). The trial court also awarded attorney's fees to Nautilus. On appeal, Mr. Akins contends that the trial court erred in awarding judgment in favor of Nautilus and in awarding attorney's fees. We affirm the trial court's judgment in

favor of Nautilus, but we reverse the trial court's award of attorney's fees.

On July 17, 2006, Nautilus filed a complaint against Mr. Akins alleging that the parties had entered into a contract for insurance for the policy year 2003-04 and that Mr. Akins was in default of the contract for failing to pay an additional premium owed as a result of an audit performed by Nautilus pursuant to the contract. Nautilus also requested an attorney's fee pursuant to Arkansas Code Annotated section 16-22-308. Mr. Akins answered, denying the allegations.

During a bench trial held on October 1, 2007, Mr. Akins testified that he was a residential home builder and had been in the business since about 1973. He said he first obtained builder's liability insurance from Nautilus in 2001-02 and paid \$3,500 for the premium that year.<sup>1</sup> He testified that for the second year, 2002-03, he paid an initial premium of about \$4,000 and after an audit at the end of the policy year owed a total of about \$8,000. Finally, he testified that Nautilus did not audit him in 2003-04, although he does not dispute the accuracy of the numbers Nautilus listed in its 2003-04 audit. He stated that the numbers used by Nautilus for the final premium adjustment were figures he provided to Springdale Insurance in his application for new insurance when he learned Nautilus was not going to renew his policy. Finally, he testified that he never would have entered into the 2003-04 contract with Nautilus had he been quoted a premium of \$30,000 on the front end.

Steve Smith, an agent for Shelter Insurance Companies, testified that he submitted Mr.

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<sup>1</sup>The policy year was September of the first year to September of the following year.

Akins's application for insurance for the year in question. He explained that Nautilus is written through Argenia Incorporated, an insurance broker in Little Rock. He sent the original application to Daniel Boone Agency, a broker for Shelter, which sent the application to Argenia to send to Nautilus. Mr. Smith said that his only job was to provide information to Nautilus through the brokers. He testified that he used a standard ACORD Commercial Insurance Application form and that he had taken and submitted Mr. Akins's application for the past three years. He said that Nautilus calculated the premium on the basis of numbers provided by him. The ACORD form that he filled out for the year 2003-04 included the classification General Contractor, with a premium basis of "Receipts 665,297," and the classification Carpentry, with a premium basis of "75,000."

In response to Mr. Akins's 2003-04 application, on October 16, 2003, Nautilus sent a "Common Policy Declarations" form setting forth the amount of the advance premium to cover Mr. Akins for the policy year. The form set forth the following classifications and premiums: 91580 - Contractors-Executive Supervisors or Executive Superintendents, premium basis \$24,000, for a premium of \$3,649; and 91583 - Contractors-subcontracted work, premium basis \$75,000, for a premium of \$2,438. The total advance premium equaled \$6,167. Mr. Smith testified that he did not know why Nautilus did not include the \$665,297 receipts from his ACORD form in the premium calculations, as Nautilus had made a premium calculation based on this amount during the previous two years. He also testified that the \$24,000 figure was a set number that is always used for the executive-salary amount.

The final premium adjustment endorsement for the policy year 2003-04, which was

based on the audited numbers, listed a final total audit premium for the year of \$34,781, less the \$6,167 already paid, for an additional premium due of \$28,614. Although Mr. Akins disputed whether Nautilus performed an audit, he did not dispute the audited numbers, which revealed the 91583 - Contractors-subcontracted work amount was not \$75,000 but \$505,212; the 91580 - Contractors-Executive Supervisors or Executive Superintendents amount remained \$24,000; and that another category, 91341 - Carpentry Interior, was \$229,831. The total of these numbers was actually very close to the total numbers revealed in the premium audit for the previous year. However, the final audit premium for the year 2002-03 was \$8,618. This was in vast contrast to the final audit premium for the year 2003-04 of \$34,781.<sup>2</sup>

Ms. Becker explained that there was “an email in the file” indicating that rates were to be increased by fifteen percent. She admitted to the court that, given the actual audited numbers, Mr. Akins would have owed only about \$9,000 if the premiums had only gone up fifteen percent and that “it looks like it did come out higher than that.”

#### I.

We review a trial court’s findings of fact from a bench trial for clear error. Ark. R. Civ. P. 52(a); *see also Neal v. Hollingsworth*, 338 Ark. 251, 992 S.W.2d 771 (1999). Mr. Akins contends that the trial court’s findings regarding Nautilus’s calculation of the final premium are clearly erroneous.

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<sup>2</sup>At trial, Wendy Becker, a premium audit specialist with Nautilus, agreed to recalculate the final premium due when Mr. Akins demonstrated that \$69,700 was his profit and not his salary and therefore should not have been included in the amount attributed to Carpentry. Nautilus agreed, considering this revision, that the additional premium due including tax amounted to \$25,290.72.

From our review of the record, it appears that the cause of the substantial increase in the premium is that the premium rate for classification 91583 - Contractors-subcontracted work actually increased 800 percent from a rate of 4.079 in 2002-03 to 32.500 in 2003-04. Presumably because the advance premium of \$6,167 was not significantly different from the advance premium of \$3,800 or the final audit premium of \$8,618 Mr. Akins had paid for the previous year, he did not notice the incorrect amounts listed on the declarations page or the significant increase in the rate for classification 91583. However, Mr. Akins has not argued that the trial court's finding that the parties entered into the contract of insurance is clearly erroneous,<sup>3</sup> nor has he argued that the contract does not allow Nautilus to audit its premium bases. In fact, Mr. Akins did not mention below or on appeal that the rate for classification 91583 was increased 800 percent or that he was unaware of this rate increase. It is not clear that he understands how his premium was in fact increased to such an extent. He simply argues that he provided the correct numbers in his application, that Nautilus made a mistake in failing to include the correct numbers in the calculation of its advance premium, and that he would not have purchased the insurance if he had known the premium was going to be so high. Mr. Akins has not appealed the trial court's ruling that there was in fact a contract between the parties.

Pursuant to the contract, Nautilus was in fact entitled to audit the premium and to collect an additional premium if such an amount was warranted after audit. Paragraph 5 of

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<sup>3</sup>We note also that Mr. Akins filed a claim under the 2003-04 policy and that the claim was paid by Nautilus.

Section IV of the Insurance Policy entitled “Premium Audit” states that the premium shown in the “coverage parts” (which included the declarations page) as advance premium, which in this case was \$6,167, “is a deposit premium only.” It adds that Nautilus will compute the earned premium for the period at the close of each audit period. Paragraph 6 of Section IV entitled “Representations” states as follows: “By accepting this policy, you agree: a. The statements in the Declarations are accurate and complete; b. Those statements are based upon representations you made to us; and c. We have issued this policy in reliance upon your representations.”

Thus, while Nautilus did not use the correct amount in classification 91583 in calculating the advance premium in its declarations, the declarations did include the new rates. Further, the contract put the burden on Mr. Akins to make sure the statements in the declarations were accurate and complete. The contract also stated that the advance premium was a deposit premium only and that Nautilus was entitled to audit the premium to make sure it was correct at the end of the term. Accordingly, we hold that the trial court’s finding that Mr. Akins owned an additional premium amount was not clearly erroneous.

## II.

Mr. Akins’s second point on appeal is that the trial court erred in awarding attorney’s fees. Specifically, Mr. Akins cites the supreme court’s decision in *Village Market, Inc. v. State Farm Gen. Ins. Co.*, 334 Ark. 227, 975 S.W.2d 86 (1998), holding that the insurance code’s specific provision for attorney’s fees found in Ark. Code Ann. § 23-79-208 supersedes Ark. Code Ann. § 16-22-308 and that the insurer cannot collect attorney’s fees under section 16-

22-308 when it prevails in an action against an insured who has sought recovery for a claim under his policy and lost.

Arkansas Code Annotated section 23-79-208 (Repl. 2004) governs attorney's fees on a policyholder's claim for loss and specifically allows a policyholder to collect attorney's fees (and damages) when he prevails in a lawsuit against the insurance company for failure to pay the loss. While the statute was silent regarding an insurance company's right to collect attorney's fees if it prevailed at the time the supreme court decided *Village Market*, the statute now provides that a policyholder will not be liable for the attorney's fees of the insurance company in the event the company is found not liable for the loss. Ark. Code Ann. § 23-79-208(a)(2) (Repl. 2004). However, the supreme court has not specifically addressed an award of attorney's fees where the lawsuit between a policyholder and an insurance company involves breach of contract regarding payment of the premium.

While the statute does not specifically apply to this situation, we note that section 2 of Act No. 135 of 1999—which added the provision that a policyholder will not be liable for the insurance company's attorney's fees where the insurance company is found not liable for the loss—provides as follows:

All laws and parts of laws in conflict with this Act are hereby repealed. Specifically, any other law or parts of law of general application regarding the award of attorneys' fees, as applied in litigation involving policies of insurance, are superseded by the provisions of this Act. Specifically, the provisions of § 16-22-308 regarding the award of attorneys' fees to the prevailing party in a civil action for breach of contract are expressly superseded by the provisions of this Act.

In light of the legislature's specific mention of Ark. Code Ann. § 16-22-308 and its broad

statement that Act 135 expressly supersedes this statute with regard to attorney's fees "as applied in litigation involving policies of insurance," we reverse the trial court's award of attorney's fees to Nautilus in this case.

Affirmed in part; reversed in part.

GRIFFEN and GLOVER, JJ., agree.